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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/995,058	11/26/2001	Jason K. Schnitzer	ESP0149	9530
ESP LLC Attn: Charles A. Mirho P.O. Box 890 Vancouver, WA 98666-0890			EXAMINER TRAN, NGHI V	
			ART UNIT 2151	PAPER NUMBER .
			MAIL DATE 08/24/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

MAILED

AUG 24 2007

Technology Center 2100

Application Number: 09/995,058
Filing Date: November 26, 2001
Appellant(s): SCHMITZER, JASON K.

Charles A. Mirho
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 26, 2007 appealing from the Office action mailed October 30, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of invention contained in the brief is correct.

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(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal:

- Dziekan et al., (US 6,704,288) issued on March 09, 2004.
- Agarwal et al., (US 2003/0028642) issued on February 06, 2003.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claim 2 has been canceled. Claims 11-22 have been withdrawn.

Therefore, claim 1 and 3-10 are presented for examination.

2. Claims 1 and 3-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dziekan et al., U.S. Patent No. 6,704,288 (hereinafter

Dziekan), in view of Agarwal et al., U.S. Patent Application Publication No. 2003/0028642 (hereinafter Agarwal).

3. With respect to claims 1 and 8, Dziekan teaches a system for use with a broadband network [fig.1], the system comprising:

- a data collector [i.e. QoS monitor **140**] coupled to obtain network performance metrics from network elements in the at least a portion of the broadband network [i.e. concerned with collecting network performance metrics, see col.4, ln.58 – col.5, ln.4]; and
- logic to measure the performance metrics by applying device-specific information for the network elements from which the network performance metrics were obtained [i.e. other measurements that may be made at either the physical or MAC level layers, see col.5, ln.36-58].

However, Dziekan does not explicitly show logic to normalize the performance metrics.

In a managing system, Agarwal discloses or suggests logic to normalize the performance metrics [i.e. normalizes the metrics, see paragraph 0078].

Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention was made to modify Dziekan in view of Agarwal by normalizing the performance metrics because this feature leads to metrics on the global usage of each resource class, as well as the usage by each customer [Agarwal, paragraph 0078]. It is for this reason that one of ordinary skill in the art

at the time of the invention would have been motivated in order to directly adjust on a per client-basis [Agarwal, paragraph 0010].

4. With respect to claims 3 and 10, Dziekan further teaches wherein the device-specific information includes at least one of make, model, hardware version, software version, and element settings associated with each of the network elements [i.e. other measurements that may be made at either the physical or MAC level layers, see col.5, ln.36-58 and col.10, lns.27-57].

5. With respect to claims 4 and 9, Dzieka further teaches wherein the data collector is further configured to obtain at least one of Management Information Base objects and command line interface information from the network elements and the logic is further to determine the device-specific information from the at least one of Management Information Base objects and command line interface information [i.e. authorized to access MIB objects of the network elements, see col.4, lns.5-34].

6. With respect to claim 5, Dzieka further teaches wherein the network performance metrics are remotely-accessible standard management instrumentation [figs.1-2].

7. With respect to claim 6, Dzieka further teaches wherein the broadband network is a Data Over Cable Service Interface Specification (DOCSIS) network [col.10, Ins.27-57] and the network performance metrics include at least one of signal-to-noise ration [col.7, ln.17], power level, equalizer coefficients setting information, error information, counter information, bandwidth, quality of service, latency, and jitter [i.e. QoS, BER, FER, see col.4, ln.58 – col.5, ln.4].

8. With respect to claim 7, Dzieka further teaches wherein the logic comprises software instructions and a computer processor configured to read and execute the software instructions [col.5, ln.48 - col.6, ln.2].

(10) Response to Argument

I. Claims 1 and 8.

As to point (I), in response to appellant's argument that there is no teaching in either reference to normalize performance metrics according to device-specific information, the examiner respectfully disagrees. Appellant is considering the references individually without taking into consideration the combined teaching of Dziekan in view of Agarwal. Appellant is reminded that the test for obviousness is what the combined teaching of the references would have suggested to one of ordinary skill in the art. See *In re Keller*, 642 F. 2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F. 2d 1091, 231 USPQ 375

(Fed. Cir. 1986). In this case, Dziekan teaches measuring the performance metrics by applying device-specific information for the network elements from which the network performance metrics were obtained [= other measurements that may be made at either the physical or MAC level layers, see col.5, ln.36-58]. However, Dziekan does not explicitly teach normalizing the performance metrics. In a related art, Agarwal discloses normalizing the performance metrics [paragraph 0078]. The combined teachings of Dziekan and Agarwal suggest normalizing performance metrics according to device-specific information.

II. Claims 3 and 10.

As to point (II), in response to appellant's argument that there is no teaching anywhere in either reference of applying make, model, hardware version, software version, or element settings to the normalization of network performance parameters, the examiner respectfully disagrees. Dziekan discloses device-specific information that includes information on how certain pre-defined parameters of the network element are set. This "element setting" information is applied to the normalization of the network performance parameters [col.5, ln.36-58 and col.10, lns.27-57].

III. Claims 4 and 9.

As to point (III), in response to appellant's argument that Dziekan does not teach that the MIB is accessed for device-specific information for use in

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normalizing network performance metrics, the examiner respectfully disagrees.

Dziekka discloses that the data collector is configured to obtain at least one of Management Information Base object and to obtain command line interface information from the network elements. The logic is used to determine device-specific information authorized to access MIB objects of the network elements, see col.4, Ins.5-34. As discussed above, Agarwal teaches normalizing the performance metrics [paragraph 0078]. Therefore, the combined teaching of Dziekan and Agarwal, suggest that the MIB is accessed for device-specific information for use in normalizing network performance metrics.

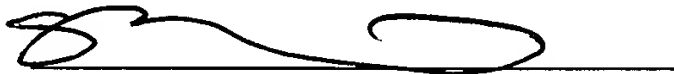
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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Nghi Tran
August 16, 2007

Conferee:



Lynne Browne

Appeal Practice Specialist, TQAS

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Valencia Martin-Wallace

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